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88-927

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

KEYSTONE SHIPPING CO.,
PETITIONER,

v.

NEW ENGLAND ENERGY INC. AND
NEW ENGLAND POWER COMPANY,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I.

QUESTIONS PRESENTED

1. Is the Federal Arbitration Act the exclusive authority upon which federal courts may determine the manner in which a private arbitration may proceed, or can federal courts invoke state law to supplement the Federal Arbitration Act and the terms of a broad-form arbitration agreement?

2. Can federal courts, applying federal substantive law pursuant to the Federal Arbitration Act, order consolidation of two arbitrations, where the respective arbitration agreements do not provide for consolidated arbitrations?

II.

PARTIES INVOLVED AND RULE 28.1 LIST

The caption of the case in this Court contains the names of all parties.

Petitioner, Keystone Shipping Co., is a wholly-owned subsidiary of Chas. Kurz & Co., Inc., a privately held company. Petitioner's affiliates and subsidiaries (all of which are privately held) are Baldbutte Shipping Company, Chestnut Shipping Company, Chilbar Shipping Company, Fredricksburg Shipping Company, Keystone Tankship Corporation, Margate Shipping Company, Shipco 668, Inc., Shipco 669, Inc., Shipco 2295, Inc., Shipco 2296, Inc., Wilmington Liquid Bulk Terminals, Inc., Mii Exports, Inc., and New England Collier Company.

TABLE OF CONTENTS

	Page
Questions Presented	I
Parties Involved and Rule 28.1 List	II
Table of Authorities	IV
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Court of Appeals' Decision Contravenes a Controlling Act of Congress and Conflicts With Decisions of This Court and Other Circuits	7
A. The First Circuit's Ruling Conflicts With Decisions of This Court Construing the Federal Act and Defining the Preemption Doctrine	7
B. The First Circuit's Decision Conflicts With Decisions of Other Courts of Appeals on the Same Matter	11
II. The Court of Appeals' Decision Undermines the Congressional Policy To Encourage Arbitration of Disputes and the Congressional Intent To Create a Uniform Body of Federal Arbitration Law Superseding the Policy Concerns of the Individual States, and Creates Confusion Which Requires Review by This Court	13
Conclusion	17

IV.

TABLE OF AUTHORITIES

Cases:	Page
Cable Belt Conveyors, Inc. v. *Alumina Partners of Jamaica*, 669 F. Supp. 577 (S.D.N.Y. 1987)	12
Compania Espanola de Petroleos, S.A. v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976)	12, 14
Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985)	7, 8, 9
Del E. Webb Construction v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987)	11, 12
Dickinson v. *Heinold Securities, Inc.*, 661 F.2d 638 (7th Cir. 1981)	9
Douglass v. *Douglass*, 88 U.S. (21 Wall.) 98 (1874)	17
Goodwin v. *Elkins & Co.*, 730 F.2d 99 (3d Cir.), *cert. denied*, 469 U.S. 831 (1984)	13
Huber, Hunt & Nichols v. *Architectural Store Co.*, 625 F.2d 22 (5th Cir. 1980)	12
Keating v. *Superior Court of Alameda County*, 645 P.2d 1192 (Cal. 1982), *rev'd sub nom. Southland* v. *Keating*, 465 U.S. 1 (1984)	14
Kroog v. *Mait*, 712 F.2d 1148 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)	10
Mitsubishi Motors v. *Soler Chrysler-Plymouth*, 473 U.S. 614 (1987)	7, 13
Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1 (1983)	7, 8, 9, 13, 16
New England Energy Inc. v. *Keystone Shipping Company*, 855 F.2d 1 (1st Cir. 1988)	*passim*
Ore & Chemical Corporation v. *Stinnes Interoil, Inc.*, 606 F. Supp. 1510 (S.D.N.Y. 1985)	12
Perry v. *Thomas*, 107 S.Ct. 2520 (1987)	7, 10
RCI Northeast Services Division v. *Boston Edison Co.*, 822 F.2d 199 (1st Cir. 1987)	17
Red Cross Line v. *Atlantic Fruit Co.*, 264 U.S. 109 (1924)	11

Sociedad Anonima de Navegacion Petrolera v. *CIA. de Petroleos de Chile, S.A.*, 634 F. Supp. 805 (S.D.N.Y. 1986) 12
Southland Corp. v. *Keating*, 465 U.S. 1 (1984). 7, 10, 13, 14
Stewart Organization, Inc. v. *Ricoh Corporation*, 108 S.Ct. 2239 (1988) 10, 11
Weyerhaeuser Co. v. *Western Seas Shipping Co.*, 568 F. Supp. 1220 (N.D. Cal. 1983), *aff'd*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984) 15
Weyerhaeuser Co. v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984) 11, 12

Statutes:

9 U.S.C. § 1, *et seq.* (1982) ..... *passim*
§ 2 (1982) 7
§ 3 (1982) 7
§ 4 (1982) 2, 4, 5, 7, 10, 12
§ 5 (1982) 7
§ 9 (1982) 7
§ 10 (1982) 7
§ 11 (1982) 7
MASS. GEN. LAWS, ch. 251, § 2A (1986) 2, 3, 4, 10

Legislative Materials:

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) 14

Rules:

Federal Rule of Civil Procedure 42(a) 4, 5, 14

Other:

1925 Att'y Gen. Ann. Rep. 16
Administrative Office of the United States Courts, 1988 Annual Report of the Director (prelim. ed. 1988) 16
Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. J. 265 (1926) 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Keystone Shipping Co., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on August 24, 1988.

Opinions Below

The opinion of the court of appeals (App. A-1 to A-17, *infra*) is reported at 855 F.2d 1 (1st Cir. 1988). The judgment and opinion of the United States District Court for the District of Massachusetts are unreported; the judgment and a stenographic transcript of the opinion appear in the Appendix, *infra*, at A-21 to A-24).

Jurisdiction

The judgment of the court of appeals was entered August 24, 1988 (App. at A-18). Petitioner's timely petition for rehearing en banc was denied on October 11, 1988 (App. at A-19). By order dated November 4, 1988, the mandate of the court of appeals was stayed, pending the filing of Keystone's petition for certiorari by December 2, 1988 (App. at A-20).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

1. The Federal Arbitration Act, 9 U.S.C. § 4 (1982), provides in relevant part as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement of arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement .... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement ....

2. Massachusetts General Laws, Chapter 251, Section 2A (1986), provides in relevant part as follows:

> A party aggrieved by the failure or refusal of another to consolidate one arbitration proceeding with another or others, for which the method of appointment of the arbitrator or arbitrators is the same, or to sever one arbitration proceeding from another or others, may apply

> to the superior court for an order for such consolidation or such severance .... No provision in any arbitration agreement shall bar or prevent action by the court under this section ....

Statement of the Case

The essential facts are not in dispute. The case involves two separate agreements, each containing standard broad-form arbitration clauses. In one contract (the "Joint Venture Agreement"), petitioner Keystone Shipping Co. ("Keystone") and respondent New England Energy Inc. ("NEEI") formed a joint venture known as New England Collier Company ("NECCO"), which became the owner and operator of a coal-carrying vessel. In the second agreement (the "Time Charter"), respondent New England Power Company ("NEP") time-chartered the vessel from the joint venturer, NECCO.[1] Neither agreement provides for consolidation of arbitrations (App. at A-25 to A-27).

In October 1987, Keystone initiated arbitration under the Joint Venture Agreement by demanding to arbitrate its claim that NEEI had breached its fiduciary duties to Keystone under that agreement. Later, in December 1987, NEP sent NECCO a notice of arbitration under the Time Charter to settle the 1988 charter hire rate for the vessel.

In January 1988, NEEI and NEP brought an action in the Superior Court of the Commonwealth of Massachusetts to consolidate the two arbitrations pursuant to MASS. GEN. LAWS, ch. 251, § 2A. The Massachusetts statute authorizes the superior court to order consolidation whether or not an agreement to arbitrate so provides, or even if the agreement provides to the contrary. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Federal Act") does not contain a provision regarding consolidation of arbitrations.

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[1] Both respondents are subsidiary corporations of New England Energy System, an electric utility holding company.

Following Keystone's removal of the action from state court, the district court denied NEEI and NEP's application for consolidation. Relying upon applicable Supreme Court and circuit court precedent, the district court concluded that it lacked the power under the Federal Act to order consolidation where the parties had not specifically provided for it in their agreements (App. at A-22). The district court found that the parties had in fact not provided for consolidation (*id.*)[2] "[B]elieving that the parties should be left to the agreements that are set out in their contracts," the district court implicitly held that the Massachusetts statute was preempted by the Federal Act, and that Fed. R. Civ. P. 42(a) granted the federal courts no power to order arbitrations consolidated where the parties have not so agreed (*id.*).

A divided panel of the court of appeals reversed. The majority found that the Federal Act did not preempt the Massachusetts arbitration statute, MASS. GEN. LAWS, ch. 251, § 2A, and therefore that consolidation could be ordered even where the parties have not provided for consolidation.

The majority opinion acknowledged the supremacy of the Federal Act with respect to "the validity, enforceability and interpretation of all arbitration contracts involving maritime or interstate commerce transactions, such as those at issue here," and that "[t]his is so even if the parties include a choice of law provision in their contract selecting a particular state's law" (App. at A-5 n.2). The majority also observed that Section 4 of the Federal Act provides that, where a court is satisfied that a contract for arbitration exists, it must order the parties "to proceed to arbitration in accordance with the terms of the agreement" (App. at A-4). To the majority, however, the language of Section 4 was irrelevant, since it perceived the issue before it to be whether state law might "supplement" the Federal Act on matters "collateral" to an agreement to arbitrate (App. at A-5 n.2).

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[2] NEEI and NEP presented to the district court excerpts from the Joint Venture Agreement and the Time Charter, including the arbitration clauses contained in Article 22 and Article 39 of the agreements, respectively. These provisions are set forth in the Appendix, *infra*, at A-25 to A-27.

The majority acknowledged that this Court "in a series of recent decisions repeatedly has stressed that courts must rigorously enforce agreements to arbitrate" (App. at A-4). It also noted the decisions of the Fifth and Ninth Circuits holding that court-ordered consolidation in the absence of explicit consent by the parties is barred by Section 4 of the Federal Act (App. at A-4 to A-5). However, the majority concluded that this Court's decisions do not prevent a federal court from ordering consolidation pursuant to a state statute when the arbitration agreement is silent on the subject of consolidation (App. at A-6).[3]

The majority held that a state's goal of "enhancing the efficiency of the arbitral process" would prevail where the state procedure does not directly conflict with a contractual provision (App. at A-9 to A-10). While recognizing that the Federal Act requires a court to treat an arbitration agreement as it would any other contract (App. at A-7), the majority "disagree[d] that ordering consolidation pursuant to a state statute when the contract is silent on the subject improperly modifies the agreement struck by the parties in violation of section four" (App. at A-6).

The majority rejected the view of the Fifth and Ninth Circuits that a court's role with respect to consolidation is solely to determine whether the parties agreed to it, and not to inquire into the underlying facts of the parties' disputes or the merits of consolidation (App. at A-8). The majority found that the policy reflected in the Massachusetts statute would govern the conduct of the arbitration where the parties' agreements have not specifically barred the procedure mandated by the statute (App. at A-9 to A-10).

Having concluded that the Federal Act did not preempt the Massachusetts consolidation law, the majority determined that the federal courts have power, pursuant to state law, to

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[3] Indeed, in analogizing between the Massachusetts consolidation statute and Fed. R. Civ. P. 42(a), the majority stated that "when each is applicable, contractual consent is not a prerequisite to ordering consolidation" (App. at A-7 n.4).

order consolidation of arbitrations governed by the Federal Act (App. at A-10). Accordingly, it reversed and remanded the matter to the district court for further proceedings.

In his dissent, Judge Selya stated that the Federal Act "cuts quite a precise pattern, leaving little room for judicial embroidery" or for the intrusion of state notions of administrative efficiency (App. at A-15). In his view:

> Consolidation is an action which can have important consequences, especially where—as here—the parties and issues are not identical. It is a course which, in cases falling within the ambit of the Federal Arbitration Act, must be left to the parties' negotiations. By fashioning an arbitral clause which omits reference to consolidation, the parties have made a choice. By imposing consolidation *ab extra*, the majority trumps that choice. Rather than order the parties to hold the arbitration to which they consented, as the Act suggests, the court disrupts the negotiated risk/benefit allocation and directs them to proceed with a different sort of arbitration. (App. at A-16).

Of equal concern to Judge Selya was that, in "leaving the dimensions of the changed bargain to the vagaries of state law," the majority not only imposed Massachusetts' pro-consolidation policy against the wishes of the contracting parties, but exalted state law over the intent of Congress to create a body of federal substantive law applicable to all agreements falling within the Federal Act (App. at A-16 to A-17).

Judge Selya would affirm the district court's judgment that ordering consolidation is improper where the parties have not provided for that procedure in their arbitration agreements. This conclusion stems from his belief that the Federal Act "necessitates that we enforce the parties' bargain as they wrote it—nothing more. Neither the language of the statute nor the decisions of the Supreme Court leave the door ajar for reshaping the bargain based on state law" (App. at A-17).

Reasons for Granting the Writ

I. THE COURT OF APPEALS' DECISION CONTRAVENES A CONTROLLING ACT OF CONGRESS AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. *The First Circuit's Ruling Conflicts With Decisions of This Court Construing the Federal Act and Defining the Preemption Doctrine.*

Contrary to the court of appeals' decision, the Federal Act circumscribes precisely the power of the federal district courts with respect to arbitration agreements governed by the Federal Act. The Federal Act provides that a district court can stay an action brought in district court on an issue referable to arbitration (9 U.S.C. § 3); order a party to proceed to arbitration (9 U.S.C. § 4); appoint an arbitrator upon application of a party (9 U.S.C. § 5); issue an order confirming an arbitration award (9 U.S.C. § 9); vacate an arbitration award under certain circumstances (9 U.S.C. § 10); and modify or correct an arbitration award (9 U.S.C. § 11). The foregoing are the only instances in which a district court is authorized to act under the Federal Act.

This Court has repeatedly stressed that the Federal Act (1) requires strict judicial deference to the provisions of private agreements to arbitrate, and (2) preempts the application of state arbitration laws to arbitration agreements falling within its ambit.[4]

In *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985), this Court made clear that

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[4] *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985); *Mitsubishi Motors* v. *Soler Chrysler-Plymouth*, 473 U.S. 614 (1987); *Perry* v. *Thomas*, 107 S.Ct. 2520 (1987).

> [b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed [*id.* at 218]. [This is so] even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. *Id.* at 221 (emphasis in original).

Stating the matter more bluntly in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), the Court held: "[T]he relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 20 (emphasis in original).

In contrast, the court of appeals has adopted the view that the absence of a consolidation provision in the parties' agreements to arbitrate (and the lack of specific reference to consolidation in the Federal Act) permits state law to step into the breach (App. at A-6). The court justifies this approach on the ground that the Massachusetts consolidation statute does "not directly conflict with a contractual provision" (App. at A-9 to A-10). The court's approach ignores the fact, recognized by the dissenting opinion (App. at A-16), that, by entering into agreements which do not authorize consolidation, the parties have *ipso facto* made a choice.[5] Invoking Massachusetts law, the court reshapes the contract between the parties—based on state notions of appropriate arbitration procedure—and imposes upon them judicial procedures for which they have not bargained.

The court, while acknowledging the holding in *Dean Witter* that arbitration agreements are to be rigorously enforced, justified its elevation of state law over the agreement of the parties by magnifying the objective of "speedy and

[5] The district court, in fact, found that "[t]here is here no express agreement that one arbitration may be consolidated with another arising under another contract" (App. at A-22).

efficient decisionmaking" (App. at A-9). The court thus misconstrued the central purpose of the Federal Act as defined by this Court. Far from endorsing "speedy and efficient decisionmaking" as an overriding goal of the Federal Act, this Court attributes this misguided view to certain lower courts with which it expressly disagrees. As the Court ruled:

> [P]assage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act to overshadow the underlying motivation.

Dean Witter, 470 U.S. at 220. The Court was "not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution — must be resolved in favor of the latter . . . ." *Id.* at 221.[6]

The court of appeals further interprets the recent arbitration cases in this Court to hold that the Federal Act preempts only state laws which would prevent arbitration from going forward (App. at A-9). The court found that, "[a]t best, the Supreme Court's decisions support a conclusion that all state laws seeking to *limit* the use of the arbitral process are superseded by federal law. None of the various preemption standards suggests that Congress intended the Federal Act to supersede all state arbitration law . . . ." (App. at A-5) (emphasis in original).

The court's conclusion directly contradicts the decision in *Moses H. Cone*, 460 U.S. at 24, in which this Court stated that the Federal Act prevails over "any state substantive or

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[6] The Court also approved the statement that "[t]here is no room in the language of the Act [or] the decisions of the Supreme Court for an ad hoc approach, based on speculative considerations of efficiency toward enforcement of arbitration agreements." 470 U.S. at 217, quoting *Dickinson* v. *Heinold Securities, Inc.*, 661 F.2d 638, 646 (7th Cir. 1981).

procedural policies to the contrary."[7] *See also Perry* v. *Thomas*, 107 S.Ct. 2520, 2527 n.9 (1987).

A recent decision of this Court reaffirms this position. In *Stewart Organization, Inc.* v. *Ricoh Corporation*, 108 S.Ct. 2239 (1988), this Court held that when a federal statute is "sufficiently broad to control the issue before the Court," the federal statute supersedes related state laws even if the state laws are not in "direct collision" with the federal statute.[8] *Id.* at 2242 and n.4.

The issue herein is the manner in which two arbitrations should be conducted. Massachusetts law grants to the courts of that state discretion to require consolidation. Section 4 of the Federal Act, however, by its terms already controls the manner in which arbitrations governed by the Act should proceed, namely, "in the manner provided for in [the arbitration] agreement." The Court in *Stewart* stated: "Our cases make clear that, as between these two choices [*i.e.*, state law and federal law] in a single 'field of operation,' the instructions of Congress are supreme." *Id.* at 2244 (cites omitted).[9]

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[7] The question of whether the federally protected right of arbitration under the Federal Act is unlawfully impaired by judicial imposition of state procedures, such as consolidation, upon the private arbitration of commercial disputes, was presented and argued to this Court in *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-16 (1984). The Court in that case declined to rule on the question, since it had not been properly raised in the court below.

[8] Significantly, the state statute in this case, MASS. GEN. LAWS, ch. 251, § 2A, *is* in "direct collision" with federal law. If an agreement specifically provides that arbitrations may *not* be consolidated, the Federal Act would enforce such a provision. The Massachusetts statute, by contrast, provides for consolidation notwithstanding such a provision.

[9] This reasoning is consistent with this Court's view of the Federal Act in *Southland Corp.*, 465 U.S. at 11: "We see nothing in the Act indicating that the broad principle of enforceability is subject to additional limitations under state law." *See also Kroog* v. *Mait*, 712 F.2d 1148, 1154 n.5 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) ("there is no indication that Congress has chosen to temper the imperatives of the Federal Arbitration Act with respect for *state* policies regarding informal dispute resolution") (emphasis in original) .

Nothing in the court of appeals' decision suggests that Section 4 is not "sufficiently broad to control the issue before the court" within the meaning of *Stewart*, 108 S.Ct. at 2244. The court has disregarded the binding precedent of this Court with regard to the Federal Act's preemption of state arbitration law, and has held that a state's grant of judicial discretion to order consolidation should dictate the manner in which two arbitrations are conducted. The court's ruling carries the additional infirmity of requiring the parties to a maritime contract, by virtue of the consolidation which the court of appeals would impose, to submit their dispute to the vagaries of state law. The result is necessarily to invite state-created "varying methods of arbitration and thus introduce the very discord which framers of the Constitution intended to prevent by adopting general maritime rules as laws of the United States." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 131 (1924) (McReynolds, J., separate opinion).

The court of appeals' holding that courts may "supplement" the provisions of the Federal Act, by judicially imposing state procedural law upon the parties to a private arbitration, frustrates the principal purpose of the Federal Act, makes a nullity of established preemption doctrine, and warrants review by this Court.

B. *The First Circuit's Decision Conflicts With Decisions of Other Courts of Appeals on the Same Matter.*

The court of appeals' broad view of its discretionary authority to control the manner in which private arbitrations proceed conflicts with circuit court decisions in *Weyerhaeuser* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), and *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987).

In *Weyerhaeuser*, the Ninth Circuit concluded that its authority to compel two separate private arbitrations to pro-

ceed in a consolidated manner was "narrowly circumscribed" by Section 4 of the Federal Act, which requires the courts to "make an order directing the parties to proceed *to arbitration in accordance with the terms of the arbitration agreement.*" 734 F.2d at 637 (emphasis in original).[10]

In *Del E. Webb*, the Fifth Circuit concurred, stating "we agree with the Ninth Circuit that under § 4 of the Federal Arbitration Act the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration." 823 F.2d at 150.

The court of appeals concedes that a conflict exists between its opinion and the rulings of the other two circuits (App. at A-8 and n.5). The court summarizes the Fifth and Ninth Circuit opinions as holding that "a court's role with regard to consolidation is simply to determine whether the parties agreed to it, without regard to the merits of consolidation and without scrutiny of the underlying facts of the parties' disputes" (App. at A-8). The court of appeals, however, explicitly parts company with the reasoning and holding of the Fifth and Ninth Circuits: "We conclude that neither the Act nor Supreme Court precedent mandates such a narrowly circumscribed role for the courts" (*id.*).

The court's decision is also in direct conflict with the Fifth Circuit's decision in *Huber, Hunt & Nichols* v. *Architectural Stone Co.*, 625 F.2d 22, 25-26 (5th Cir. 1980), which reversed

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[10] A conflict among the circuit courts on this issue was noted by the Ninth Circuit in *Weyerhaeuser:* "Insofar as [the Second Circuit] holds that federal courts may order consolidation in the absence of consent, we decline to follow it." 743 F.2d 637, citing *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976). One district court judge in the Second Circuit has concluded that *Compania* is "no longer good law" and "contrary to recent Supreme Court pronouncements on the scope of the Federal Arbitration Act", *Ore & Chemical Corporation* v. *Stinnes Interoil, Inc.*, 606 F. Supp. 1510, 1512 (S.D.N.Y. 1985). *Contra*, *Sociedad Anonima de Navegacion Petrolera* v. *CIA. de Petroleos de Chile, S.A.*, 634 F. Supp. 805, 808-809 (S.D.N.Y. 1986); *Cable Belt Conveyors, Inc.* v. *Alumina Partners of Jamaica*, 669 F. Supp. 577, 579-581 (S.D.N.Y. 1987).

the district court's application of state law and instructed the district court to "determine whether the contract involved interstate commerce and, if so, proceed to the propriety of consolidation under the [Federal] Arbitration Act."

II. The Court of Appeals' Decision Undermines the Congressional Policy to Encourage Arbitration of Disputes and the Congressional Intent To Create a Uniform Body of Federal Arbitration Law Superseding the Policy Concerns of the Individual States, and Creates Confusion Which Requires Review by This Court.

The court of appeals allowed the issue before it to be governed by state law because it believed that, absent a direct conflict with the parties' arbitration agreement, Massachusetts' pro-consolidation policy would prevail (App. at A-9 to A-10).

The effect of this decision is: (1) to allow differing state law arbitration provisions to defeat the congressional intent to "establish a uniform federal law over contracts which fall within [the Federal Act's] scope", *Goodwin* v. *Elkins & Co.*, 730 F.2d 99, 108 (3d Cir.), *cert. denied*, 469 U.S. 831 (1984); and (2) to force upon parties to arbitration provisions a new requirement, namely, to specifically rule out consolidation or, indeed, any other procedural technicalities which a state may authorize a court to impose upon private arbitration proceedings.

In *Southland Corp.*, 465 U.S. at 13, this Court found that Congress "contemplated a broad reach of the Act, unencumbered by state-law constraints." As the Court reemphasized only last year, in *Mitsubishi Motors* v. *Soler Chrysler-Plymouth*, 473 U.S. 614 (1987):

> [T]he Act as a whole is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act "simply creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Id.* at 625 (quoting *Moses H. Cone*, 460 U.S. at 25).

Every year, innumerable individuals and entities enter into private arbitration agreements governed by the Federal Act. The split between the First and Second Circuits, on one hand, and the Fifth and Ninth Circuits, on the other, leaves in doubt the extent to which contractual expectations for private arbitration, without litigation or court intervention, can be overridden by judicial discretion or state law.[11]

The court's decision produces an aberration. In those federal courts which follow the First Circuit's lead, state arbitration laws may "supplement" the terms of arbitration agreements which fall within the Federal Act. The ruling empowers judges to interpret the silence of standard broad-form arbitration agreements on the issue of consolidation—or, for that matter, any arbitration-related issue—as an invitation to determine the manner of a private arbitration in accordance with state law.

As noted earlier (p. 7), the Federal Act carefully limits federal judicial authority with respect to arbitration agreements governed by the Federal Act. The First Circuit's decision carves out a new area of judicial intervention not authorized by the Federal Act and which is contrary to the explicit intent of Congress.[12] If allowed to stand, the court's decision would place no apparent limitation upon the power of the federal judiciary to intervene in order to "supplement" the terms of private arbitration agreements. The ruling supports,

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[11] The split is characterized not only by two opposing conclusions, but by varied approaches on the part of the two circuits which authorize courts to impose consolidation. The Second Circuit, in *Compania Espanola*, derived its authority to order consolidation from Fed. R. Civ. P. 42(a). *See* 527 F.2d at 975. The First Circuit distinctly steered clear of Rule 42(a) (App. at A-7 n.4) and ruled that the "general approach" of the Federal Act itself allows for court-ordered consolidation based on state law where the parties' agreements are silent on the issue of consolidation (App. at A-10).

[12] H.R. Report No. 96, 68th Cong., 1st Session, 2 (1924), states: "[T]he party willing to perform his contract for arbitration [should] not [be] subject to the delay and cost of litigation. Machinery is provided for the prompt determination of his claim for arbitration and that the arbitration proceeds without interference by the court."

where an agreement to arbitrate is silent, the imposition of federal court-supervised discovery, briefing, class certification, notice procedures, and even time limitations and mandatory preparation of transcripts, where state law so provides. *See Keating* v. *Superior Court of Alameda County*, 645 P.2d 1192, 1214-1218 (Cal. 1982) (concurring and dissenting opinion), *rev'd sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).

This petition presents the Court with a compelling opportunity to resolve the conflicting views of the circuit courts. The issues of the applicability of state arbitration laws under the Federal Act and the consolidation of separate arbitration proceedings have frequently arisen in the past, and inevitably will be a recurring question in the federal courts.[13] These are, however, questions which are seldom available for Supreme Court review. This case presents the Court with a timely opportunity to settle these important issues.

The decision of the court of appeals encourages parties to request federal courts to determine whether consolidation can be imposed upon private arbitrations (based merely upon the existence of a common issue of fact or law), notwithstanding the lack of consent of the parties to that procedure. If the courts are allowed to address this question, they will necessarily be required to assess, *inter alia*, the similarity of factual and legal issues in the two or more arbitrations, whether the lack of a common party to the various arbitrations argues against consolidation, and whether consolidation would prejudice the interest of any party. In short, the courts would become entangled in the merits of the parties' positions and their views regarding the details of their disputes.

Parties may justifiably wonder whether an agreement to arbitrate gives them the insulation from the vexation and

[13] Arbitration clauses are featured in a vast number of commercial contracts, including those in the securities field, and have long been standard fare in charter parties. *See Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 568 F. Supp. 1220, 1221 (N.D. Cal. 1983), *aff'd*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984).

expense of litigation for which they bargained — and which is frequently the paramount motivation in selecting arbitration as a means of settling conflicts.[14]

The court of appeals' holding thus bears the potential for discouraging the use of arbitration as a method of dispute resolution. The decision, far from advancing the congressional intent of protecting parties to an arbitration agreement from the delay and cost of litigation, will prompt parties to resort to federal court before proceeding to arbitration. In addition to contravening one of the Federal Act's primary purposes,[15] this result would aggravate the congestion and delay now afflicting federal dockets.[16]

The decisions of the Fifth and Ninth Circuits, by contrast, tend to encourage the use of arbitration, in that they require district courts to honor the contractual expectations of the parties. The latter decisions impart the simple wisdom that if parties desire consolidated arbitration, they can provide accordingly in their respective arbitration agreements.

If federal courts in other circuits were to adopt the reasoning of the court below, they would be free to impose arbitration procedures drawn from the laws of the states in which they sit. The result would be a patchwork of disparate rulings which would subvert the congressional purpose of creating a uniform federal law to govern agreements that fall within the scope of the Federal Act. Nor could parties have any assurance that the terms of their arbitration agreements would not be overridden, sup-

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[14] The tactical skirmishing in court, which the respondents have imposed upon petitioner in their attempt to obtain the perceived advantage of consolidation, is exactly the sort of delay and procedural technicality which the Federal Act was designed to allow parties to avoid. *See* Cohen and Dayton, *The New Federal Arbitration Law*, 12 Va. L. J. 265, 269-270 (1926).

[15] This Court, in *Moses H. Cone*, 460 U.S. at 22, noted "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."

[16] In 1925, when Congress enacted the Federal Act, there were 38,721 civil cases before the federal courts. 1925 Att'y Gen. Ann. Rep. 129. As of June 30, 1988, such cases numbered 244,242. Administrative Office of the United States Courts, 1988 Annual Report of the Director 28 (prelim. ed. 1988).

plemented or altered in ways that they could not have predicted when they entered into their agreements.[17]

The guidance of this Court is required to steady the course of federal arbitration policy. That policy now threatens to develop in perilously divergent ways as a result of the present split in the circuit courts. This Court should instruct federal courts as to the appropriate limits of judicial intervention in private arbitration agreements. Parties to private arbitration agreements need to know under what circumstances, if any, unconsented-to arbitration procedures can be imposed upon them.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1, 1988

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[17] The proper role of the federal courts with respect to arbitration agreements, as with any contractual agreements, does not include supplementing the terms thereof. *RCI Northeast Services Division* v. *Boston Edison Co.*, 822 F.2d 199, 205 (1st Cir. 1987) ("It is no appropriate part of judicial business to rewrite contracts freely entered into between sophisticated business entities." *Douglass* v. *Douglass*, 88 U.S. (21 Wall.) 98, 104 (1874) ("We cannot interpolate what the contract does not contain. Our duty is to execute it as we find it, and not to make a new one.")

United States Court of Appeals
For the First Circuit

No. 88-1202

NEW ENGLAND ENERGY INC., ET AL.,

PLAINTIFFS, APPELLANTS,

v.

KEYSTONE SHIPPING COMPANY,

DEFENDANT, APPELLEE.

No. 88-1203

KEYSTONE SHIPPING COMPANY,

PLAINTIFF, APPELLEE,

v.

NEW ENGLAND ENERGY INC.,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, *U.S. District Judge*]

Before
COFFIN, TORRUELLA and SELYA, *Circuit Judges*.

John M. Stevens with whom *John H. Henn*, *Foley, Hoag & Eliot*, *John F. Sherman, III* and *Cheryl A. LaFleur* were on brief for appellants.

Rudolph F. Pierce with whom *Kitt Sawitsky*, *Joel R. Leeman*, *Goulston & Storrs, P.C.*, *Raymond J. Burke*, *Thomas A. Dillon, Jr.*, *Burke & Parsons* and *Ralph G. Hill* were on brief for appellee.

August 24, 1988

COFFIN, *Circuit Judge*. This case requires us to decide whether federal courts have the power to order consolidation of two arbitrations when the parties' agreements to arbitrate

make no express reference to the issue of consolidation. The district court, although determining that consolidation was appropriate under the circumstances, held that it lacked the power to order consolidation. We have carefully reviewed the authorities and see no compulsion of law or policy barring a district court from issuing such an order, at least when the agreement between the parties is silent and the pertinent state law specifically provides for such. We therefore reverse.

I.

We shall briefly describe the facts at this point in order to give some context to our discussion, but the primary question before us is a purely legal one and so we need not dwell on the particulars of this case. The parties here are signatories to one of two maritime contracts, both of which provide that disputes arising out of the agreements will be referred to arbitration in Boston "pursuant to the laws relating to arbitration there in force." In one contract, appellant New England Energy Inc. (NEEI) and appellee Keystone Shipping Co. (Keystone) created a joint venture known as the New England Collier Company (NECCO), which became owner and operator of a coal carrying ship named the *Energy Independence*. In the other agreement, appellant New England Power Company (NEP) chartered the *Energy Independence* from the joint venture. Both NEEI and NEP are part of the New England Electric System, (NEES), an electric utility holding company. Arbitration #1 is between NEEI and Keystone — the joint venturers — and Arbitration #2 is between NEP, the ship operator, and NECCO, the joint venture that chartered the ship to NEP.

NEEI and NEP filed an action in state court in January 1988 seeking consolidation of the two arbitrations pursuant to the Massachusetts Uniform Arbitration Act, Mass. Gen. Laws Ann. ch. 251, § 2A.[1] Keystone removed the action to federal

[1] The statute provides, in relevant part:

> A party aggrieved by the failure or refusal of another to agree to consolidate one arbitration proceeding with another or others, for

court based on diversity jurisdiction. After a hearing, the district court ruled that the factual circumstances were appropriate for consolidation, but it nevertheless denied the application for consolidation on the ground that it lacked the power to join the cases. The court interpreted the Federal Arbitration Act and Supreme Court precedent to say that, in the absence of a specific provision in the parties' contracts allowing consolidation, federal courts are without power to consolidate arbitrations. The district court implicitly found both that the Act preempted the Massachusetts statute providing for consolidated arbitrations, and that it deprived the court of its power to order consolidation under Fed. R. Civ. P. 42(a). NEEI and NEP then filed this appeal.

After carefully reviewing the Supreme Court cases and considering the policies of the Act, we conclude that consolidation could be ordered in this case pursuant to the Massachusetts arbitration consolidation statute. We need not decide whether a federal court also has the power, under Fed. R. Civ. P. 42(a), to order consolidation in the absence of a state law providing for it. We now turn to our reasons for concluding that Massachusetts law is not preempted in this case.

II.

The Federal Arbitration Act, 9 U.S.C. §§ 1-14, was passed to ensure that courts would honor the contractual agreements of parties who choose to resolve their disputes by means of the informal arbitration procedure. *See, e.g., Mitsubishi Motors, Inc.* v. *Soler Chrysler-Plymouth*, 473 U.S 614, 625-626 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220

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which the method of appointment of the arbitrator or arbitrators is the same . . . may apply to the superior court for an order for such consolidation . . . . [T]he issue shall be decided under the Massachusetts Rules of Civil Procedure governing consolidation and severance of trials and the court shall issue an order accordingly. No provision in any arbitration agreement shall bar or prevent action by the court under this section.

(1985). Section 2 of the Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 4 provides that once a court is satisfied that a contract provides for arbitration, the court must order the parties "to proceed to arbitration in accordance with the terms of the agreement." *Id.* at § 4. The Act makes no reference to consolidation of arbitrations.

Recognizing that this statute establishes a "federal policy favoring arbitration," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), the United States Supreme Court in a series of recent decisions repeatedly has stressed that courts must " 'rigorously enforce agreements to arbitrate,' " *Shearson/American Express* v. *McMahon*, 107 S. Ct. 2332, 2337 (1987) (quoting *Dean Witter Reynolds*, 470 U.S. at 221). *See also Perry* v. *Thomas*, 107 S. Ct. 2520, 2525 (1987); *Mitsubishi Motors*, 473 U.S. at 625; *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Memorial Hospital*, 460 U.S. at 24.

Appellee argues that the principle of strict adherence to arbitration agreements, established by both the Act and the Supreme Court cases, means that unless consolidation is affirmatively approved in the agreement to arbitrate, it may not be ordered, notwithstanding any state law providing for consolidation. Specifically, appellee contends that ordering consolidation in the absence of the parties' explicit consent is barred by section 4 of the Act, which requires courts to enforce arbitration agreements "in accordance with [their] terms." Appellee relies for this proposition on two circuit court decisions holding that a federal court's role in this context is to determine "only whether the contract provides for consolidated arbitration, a question free of the underlying facts [concerning the merits]," *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145, 150 (5th Cir.

1987). *See also Weyerhauser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984). One other circuit has held that federal courts may consolidate arbitrations. *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975).

We note first that, even when federal law applies to an arbitration agreement,[2] the Federal Arbitration Act has never been construed to preempt all state law on arbitration. We do not read the recent series of Supreme Court arbitration cases to establish such a proposition by implication. Those cases concerned only laws that would override the parties' choice to arbitrate rather than litigate in court, in direct conflict with the Act's primary purpose of ensuring the enforcement of privately negotiated arbitration agreements. *See* cases listed *supra* at 4-5. At best, the Supreme Court's decisions support a conclusion that all state laws seeking to *limit* the use of the arbitral process are superseded by federal law. None of the various preemption standards suggests that Congress intended the federal Act to supersede all state arbitration law, and appellee Keystone does not argue to the contrary. *See Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 849 (1st Cir. 1988) (detailing the "variants" of the preemption doctrine, quoting

[2] The Federal Arbitration Act governs the validity, enforceability and interpretation of all arbitration contracts involving maritime or interstate commerce transactions, such as those at issue here. This is so even if the parties include a choice of law provision in their contract selecting a particular state's law. *See Southland Corp.*, 465 U.S. at 12 (Arbitration Act was an exercise of the commerce clause power, thus applicable in federal and state court, citing *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 405 (1967)); *Apex Fountain Sales, Inc.* v. *Kleinfeld*, 818 F.2d 1089, 1094 n.4 (3d Cir. 1987); *Huber, Hunt & Nichols, Inc.* v. *Architectural Stone Co.*, 625 F.2d 22, 25 n.8 (5th Cir. 1980); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263, 1268-71 (7th Cir. 1976); *Collins Radio Co.* v. *Ex-Cell-O Corp.*, 467 F.2d 995, 997-99 (8th Cir. 1972); *American Airlines, Inc.* v. *Louisville & Jefferson County Air Board*, 269 F.2d 811, 815-817 (6th Cir. 1959). In this case, there is no question concerning the supremacy of the federal Act in determining the *validity and enforceability* of an arbitration clause. Everyone agrees that the federal Act governs those matters, which are not in dispute here. The issue before us is whether state law may supplement that Act on matters collateral to the agreement to arbitrate.

Louisiana Public Service Comm'n v. *FCC*, 476 U.S. 355, 368-69 (1986)). *See also Societe Generale de Surveillance* v. *Raytheon*, 643 F.2d 863, 867 (1st Cir. 1981) (federal Arbitration Act preempts "only that state law inconsistent with its express provisions").

Nor do we see a preemption problem between the Act and the particular statute before us, the Massachusetts arbitration consolidation provision. Because the Act says nothing about consolidation, the Massachusetts statute — as appellants seek to enforce it[3] — does not directly conflict with the Act's provisions. Appellee's argument, however, is not that the Act directly contradicts the Massachusetts statute, but that the state law is superseded in this case because the parties' contracts do not provide for consolidation, and an order to consolidate would therefore conflict with the requirement in section four of the federal Act that courts enforce arbitration agreements according to their terms.

We disagree that ordering consolidation pursuant to a state statute when the contract is silent on the subject improperly modifies the agreement struck by the parties in violation of section four. We believe, as appellants argue, that an order not contradicting the contractual terms regarding arbitration is "in accordance with [those] terms." This is certainly true when the language of the arbitration clause is broad and in no way suggests limits on the subjects or parties to the agreed-upon arbitration. *See, e.g.*, *Compania Espanola de Petroleos*,

[3] The statute states that "[n]o provision in any arbitration agreement shall bar or prevent action by the court under this section." Mass. Gen. Laws Ann. ch. 251, § 2A. Because the parties' agreements in this case do not refer to consolidation, we need not address whether federal law bars the state statute from superseding a contractual provision expressly prohibiting consolidation. Supreme Court precedent strongly indicates, however, that State law should not prevail over such a privately negotiated contractual provision. *See, e.g.*, *Mitsubishi Motors*, 473 U.S. at 625 ("'The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered . . . .'") (quoting *Dean Witter Reynolds, Inc.*, 470 U.S. at 221).

527 F.2d at 969 ("Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration . . . ."). To borrow appellants' illustration, a person directed to take an early plane to New York would be acting "in accordance with" her instructions whether she flew coach or first class, notwithstanding the instructions' silence on the type of seat to purchase. Our traveler also would not violate her instructions, which were silent on how she was to get to the airport, if she were to take a taxicab. Simply put, arbitration is still arbitration even if it is consolidated arbitration.

Moreover, as the Supreme Court has emphasized, the purpose of the Arbitration Act was "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,'" *Dean Witter Reynolds Inc.*, 470 U.S. at 219 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)). Under the Federal Rules of Civil Procedure, a federal court may consolidate separate actions pending before it if the actions involve a common question of fact or law. Fed. R. Civ. P. 42(a). There is no limitation on the court's power to consolidate contract actions based on the parties' failure affirmatively to agree to consolidation. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2383 (1971) (court is given broad discretion to decide whether consolidation is desirable; parties' consent not required). Thus, to the extent that the Act requires a court to treat an arbitration agreement as it would any other contract, consent is not a prerequisite to ordering consolidation.[4] *See Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("the pur-

[4] We do not mean to suggest a holding that federal courts have the power to consolidate arbitrations under Fed. R. Civ. P. 42(a). We simply are analogizing between the Massachusetts arbitration consolidation statute and Rule 42(a), noting that when each is applicable, contractual consent is not a prerequisite to ordering consolidation.

pose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so").[5]

In addition to its argument that section four of the Act prevents a court from ordering consolidation without the parties' consent, appellee also suggests that the Supreme Court in its decisions has decided that the federal Act mandates federal courts to observe a "hands-off" approach to arbitrable claims, i.e., that courts should refrain from any unnecessary involvement with arbitrable claims. This view — which is, is essence, a preemption argument — is reflected in the Fifth and Ninth Circuit cases that hold that a court's role with regard to consolidation is simply to determine whether the parties agreed to it, without regard to the merits of consolidation and without scrutiny of the underlying facts of the parties' disputes. *Weyerhaeuser*, 743 F.2d at 637; *Del E. Webb*, 823 F.2d at 150.

We conclude that neither the Act nor Supreme Court precedent mandates such a narrowly circumscribed role for the courts. The Supreme Court decisions indicate that it may at times be appropriate, and necessary, for a court to consider the factual background of the dispute that will be arbitrated. *See, e.g., Mitsubishi*, 473 U.S. at 621-22, 628 (court of appeals,

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[5] We obviously do not view the decision to arbitrate as implicitly rejecting consolidation in addition to general, everyday litigation procedures. At least two courts apparently disagree. *See Weyerhaeuser*, 743 F.2d at 637; *Ore & Chemical Corp.* v. *Stinnes Interoil, Inc.*, 606 F. Supp. 1510, 1513 (S.D.N.Y. 1985). Both refer to the provision in section four of the Act that a court must enforce an arbitration agreement in accordance with its terms, and then quote the following language from *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974):

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.

In *Scherk*, the issue before the Court was whether to give effect to an arbitration clause providing for arbitration in Paris, France, or to allow an action to continue in federal court in the United States. In making the above quoted statement, the Court simply was noting that basic arbitration procedures differ from judicial ones — and it is only those informal operational procedures that we believe a party affirmatively chooses when agreeing to an arbitration clause.

which assessed arbitrability "'on an allegation-by-allegation basis,'" correctly conducted a 2-step inquiry that involved consideration of the substance of the parties' dispute). The scrutiny may be for the purpose of deciding whether a claim is arbitrable, or it may be for the purpose of deciding whether two claims should be consolidated.

More particularly, nothing in the recent series of Supreme Court decisions indicates that a state law whose purpose is to promote the expeditious resolution of cases *by means of the arbitral process* is at odds with the policy behind the Federal Arbitration Act. In each of the cases emphasized by the appellee, the justices were faced with competing laws that would have placed claims in the courts instead of in arbitration. Two of those cases involved state law. In *Southland*, the California Supreme Court held that a state franchise investment statute invalidated the parties' agreement to arbitrate certain claims. Similarly, in *Perry*, the California Supreme Court had upheld a state labor law requirement that litigants be provided a judicial forum for resolving wage disputes, despite the existence of a private agreement to arbitrate such disputes. In holding the state laws to be preempted in *Southland* and *Perry*, the Supreme Court observed that "[w]e see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Southland*, 465 U.S. at 11; *Perry*, 107 S. Ct. at 2525.

The Massachusetts arbitration consolidation provision, as appellants seek to enforce it, does not in any way limit "the broad principle of enforceability" of private agreements to arbitrate. There is no attempt here to divert a case from arbitration to court. Massachusetts seeks only to make more efficient the process of arbitrating. Although the Supreme Court has held that agreements to arbitrate must be enforced "even if the result is 'piecemeal' litigation," *Dean Witter Reynolds*, 470 U.S. at 221, the Court also has recognized the Act's endorsement of "speedy and efficient decisionmaking," *id.* at 219. We fail to see why a state should be prevented from enhancing the

efficiency of the arbitral process, so long as the state procedure does not directly conflict with a contractual provision.

Nor does the Act's general approach indicate that a federal court would overstep its role if it ordered consolidation under state law after determining that the contract does not bar consolidated arbitration. Because a federal court must have subject matter jurisdiction independent of the Act to hear a case arising under the Act,[6] a finding that a matter is arbitrable does not automatically divest the court of its authority over the case. Indeed, the Act in certain situations empowers the court to choose arbitrators and enforce arbitration subpoenas. *See* 9 U.S.C. §§ 5, 7. Thus, federal courts have jurisdiction to decide more than just the question of arbitrability, and if requested to do so, a court has the power to order compliance with an applicable state law.

We therefore turn now to the question of whether the district court should have ordered consolidation in this case.

III.

Our assumption in this case is that the parties' contracts are, in fact, silent on the issue of consolidation. Unquestionably, there is no intent manifested against consolidation. Both contracts contain broad provisions calling for arbitration of "[a]ny and all differences and disputes of whatsoever nature." Appellants, however, argue that the contracts evidence an intention to permit consolidation by means of the clause in each providing for arbitration "in the City of Boston pursuant to the laws relating to arbitration there in force." The arbitration laws in force in Boston include not only the federal Act but also the Massachusetts arbitration consolidation statute. Thus, appellants suggest that the parties affirmatively agreed to the possibility of consolidation.

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[6] The Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, but it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise. *Southland Corp.*, 465 U.S. at 15 n.9; *Moses H. Cone Memorial Hospital*, 460 U.S. at 25 n.32.

We need not rest our decision on these contractual clauses, however, because we have concluded that consent is not a prerequisite to application of the Massachusetts consolidation statute. Our task, therefore, is simply to determine whether the district court correctly found that the two arbitrations at issue here meet the requirements for consolidation.[7]

Massachusetts law provides that the issue of consolidation shall be decided under Mass. Rule Civ. P. 42, which follows federal law and allows consolidation if there is a common question of law or fact. If this requirement is met, a court typically has broad discretion to decide whether consolidation is appropriate. *See, e.g., Sutcliffe Storage & Warehouse Co.* v. *U.S.*, 162 F.2d 849, 851 (1st Cir. 1947); 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2383 (1971).

At this point, it is appropriate to add more facts to those we sketched briefly in Section I *supra*.[8] The joint venture between Keystone and NEEI was for the purpose of constructing, owning and operating a coal ship and time chartering it to NEP on a long term basis. The joint venture agreement provides that NEEI holds the majority interest in NECCO, the joint venture company, and controls two votes on NECCO's management committee to Keystone's one vote. The time charter between NECCO and NEP, which was for a term of 24 and one-half years, identified a procedure for setting the ship's rate of hire on an annual basis. This "annual fixed rate" was to be 90 percent of the then current market rate for comparable time charters of comparable vessels engaged in the same trade over the same route. The contract calls the comparable vessels "relevant fixtures."

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[7] Although the district court's finding that consolidation was appropriate was rendered irrelevant by its conclusion that it lacked the power to consolidate, we see no reason to remand the case for the court to reconsider the issue. The court expressly found in favor of consolidation, and we think it inevitable that, upon remand on the same facts, the court would simply enter a final judgment ordering consolidation. In the interest of efficiency, we address the question at this juncture.

[8] These facts are drawn largely from appellants' brief, but also include matters appearing in appellee's papers contained in the record. Our belief is that there is no dispute over the facts we describe.

Beginning in 1984, disputes arose over the annual fixed rate, particularly concerning which other vessels qualified as relevant fixtures. For the years 1984 through 1986, NEEI agreed with NEP's proposal, while Keystone's representative initially disagreed but ultimately accepted the rate. For 1987, Keystone maintained its objection to the proposed rate, but because NEEI controlled the management committee, the rate was adopted by a 2-1 vote.

In October 1987, Keystone gave notice of Arbitration #1 against NEEI, alleging that NEEI repeatedly has breached its fiduciary duty to Keystone. Keystone contends that NEEI has favored NEP's interests over those of the joint venture, NECCO, particularly with regard to the charter rates. NEEI and NEP are both subsidiaries of the New England Electric System (NEES).

Sometime after this first arbitration was set in motion, NEP proposed its annual fixed rate for 1988. Although NEEI agreed with the proposal, its two representatives abstained from voting for it because Arbitration #1 was pending. Keystone voted against the rate, but no agreement was reached with NEP because two votes were needed for a decision. In December 1987, NEP noticed its intent to arbitrate the 1988 rate of hire for the *Energy Independence*, which became Arbitration #2.

NEEI and NEP claim that consolidating the two arbitrations is appropriate because both involve common questions of fact and law concerning the proper rate of hire for the *Energy Independence*. As a result, there is the risk of inconsistent results. They also claim that the real parties in interest, NEES on the one hand (specifically represented by NEEI and NEP), and Keystone on the other, are the same in each dispute.

Keystone responds that the two arbitrations fail to satisfy the criteria for consolidation because the parties in each are different — notwithstanding the joint parenthood of NEEI and NEP — and the issues are "wholly different." In addition,

Keystone notes that hearings must be held in Arbitration #1 to determine who should appoint NECCO's arbitrator, and control NECCO's role, in Arbitration #2. At oral argument, Keystone stated that it opposed consolidation for fear that the fiduciary duty questions would get lost among the more technical matters concerning the rate of hire.

We cannot say that the district court abused its discretion in concluding that the two arbitrations should be consolidated. Both will necessarily involve resolution of the rate of hire questions, and the possibility of inconsistent results seems real. As appellants point out, even formally NEEI is a participant in each of the two arbitrations, individually in one and as a coventurer in the other. Although Arbitration #1 will entail consideration of more issues and different law from Arbitration #2, which is limited to the question of the 1988 rate of hire, complete identity of the cases is not a prerequisite to consolidation. Moreover, we are unpersuaded that consolidation of the cases necessarily would diminish the attention given to Keystone's fiduciary duty claims. We presume Keystone will vigorously argue its position, and that the arbitrators will therefore give it full consideration.

As to Keystone's argument that proceedings in Artbitration #1 must be held before Arbitration #2 may begin in order to determine who has the authority to appoint NECCO's arbitrator in the later-noticed arbitration, we do not believe this is a sufficient basis for reversing the district court's finding that consolidation is appropriate. Our assumption is that the arbitrators selected for Arbitration #1 could set the consolidated arbitrations in motion by deciding upon the selection of arbitrators for Arbitration #2. Once all arbitrators have been appointed, the merits of the cases could be heard. The district court may have other ideas, however, about how the consolidated arbitrations should proceed, and we leave that decision to it in the first instance.[9]

[9] The district court is, of course, free to consider its finding on the propriety of consolidation if factors not originally brought to its attention now convince it that consolidation would be inappropriate.

Reversed and remanded for further proceedings not inconsistent with this opinion.[10]

Dissent Follows.

[10] Case No. 88-1203, concerning appointment by the court of a third arbitrator for Arbitration #1, also is remanded to the district court for further consideration in light of this opinion.

SELYA, *Circuit Judge* (dissenting). I respectfully dissent. Although the question posed in these appeals is not free from doubt, I take a more isthmian view of it than do my colleagues.

The Federal Arbitration Act cuts quite a precise pattern, leaving little room for judicial embroidery. It specifically directs that, if there is "an agreement for arbitration . . . made in writing and . . . a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration *in accordance with the terms [of the agreement]*." 9 U.S.C. § 4 (emphasis supplied). In crafting this provision Congress' "preeminent concern . . . was to enforce private agreements into which parties had entered . . . ." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). The Supreme Court has repeatedly instructed that if such agreements exist, they must be enforced rigorously. *E.g.*, *Perry* v. *Thomas*, 107 S.Ct. 2520, 2526 (1987); *Byrd*, 470 U.S. at 221. Wonted considerations of administrative efficacy and the like do not weigh in this unique balance; the Act "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Memorial Hospital* v. *Mercury Const. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in original).

Here, there are two separate agreements, involving somewhat different parties. Both agreements contain arbitral clauses and are, concededly, subject to the Act. Neither agreement provides for consolidation. Absent such a provision, the duty rigorously to enforce the agreements "in accordance with the terms thereof," 9 U.S.C. § 4, does not allow us to substitute our judgment for that of the parties and order the proceedings consolidated. *Accord Del E. Webb Const.* v. *Richardson Hospital Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 636-37 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984); *Ore & Chemical Corp.* v. *Stinnes Interoil, Inc.*, 606 F. Supp. 1510,

1512-15 (S.D.N.Y. 1985).[1] Nor can the happenstance that a state has a law allowing consolidation — or mandating it, for that matter — command a different result.

I need not paint the lily. Consolidation is an action which can have important consequences, especially where — as here — the parties and issues are not identical. It is a course which, in cases falling within the ambit of the Federal Arbitration Act, must be left to the parties' negotiations. By fashioning an arbitral clause which omits reference to consolidation, the parties have made a choice. By imposing consolidation *ab extra*, the majority trumps that choice. Rather than order the parties to hold the arbitration to which they consented, as the Act suggests, the court disrupts the negotiated risk/benefit allocation and directs them to proceed with a different sort of arbitration. Perhaps the consolidated arbitration will prove to be better conceived, or more efficient — but it is not what the parties agreed to undertake.

There is a second reason why my colleagues' decision strikes me as wrong. In leaving the dimensions of the changed bargain to the vagaries of state law, the majority demeans the quintessentially *federal* nature of the rule of decision. *See Perry*, 107 S.Ct. at 2527 n.9. In my mind, judicial recourse to a salmagundi of differing state arbitration laws countervails the objectives of the Federal Arbitration Act. Put another way, superimposing Massachusetts' pro-consolidation policy on the expressed wishes of the contracting parties unduly exalts state law and, in the process, subverts the concept of "creat[ing] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."

---

[1] In *Ore & Chemical Corp.*, the district court within the Second Circuit expressly declined to follow the decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.* 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) — a decision upon which my brethren rely. Judge Edelstein termed *Nereus* "no longer good law" and "contrary to recent Supreme Court pronouncements on the scope of the Federal Arbitration Act." 606 F. Supp. at 1512. I agree.

Moses H. Cone Memorial Hospital, 460 U.S. at 24. *See also Mitsubishi Motors* v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1987) (same). In my estimation, Congress did not intend that the state-law camel could so obtrusively stick its nose into the federal-law tent. *See generally Southland Corp.* v. *Keating*, 465 U.S. 1, 13 (1984) (Congress "contemplated a broad reach of the Act, unencumbered by state-law constraints"); *Kroog* v. *Mait*, 712 F.2d 1148, 1154 n.5 (7th Cir. 1983) ("there is no indication that Congress has chosen to temper the imperatives of the Federal Arbitration Act with respect for *state* policies regarding informal dispute resolution") (emphasis in original), *cert. denied*, 465 U.S. 1007 (1984).

The Federal Arbitration Act necessitates that we enforce the parties' bargain as they wrote it — nothing more. Neither the language of the statute nor the decisions of the Supreme Court leave the door ajar for reshaping the bargain based on state law. Because I think that the district court correctly gauged the impropriety of ordering consolidation absent a provision to that effect in the agreements, I would affirm the judgments below.[2]

---

[2] Fed. R. Civ. P. 42(a) does not compel a contrary result. That procedural rule provides for consolidation "[w]hen actions . . . are pending before the court. . . ." *Id.* Palpably, the two sets of arbitration proceedings were not triable to, or pending before, the district court on the merits. Accordingly, Rule 42(a) does not empower their consolidation. *See Ore & Chemical Corp.*, 606 F. Supp. at 1514-15 & n.3.

United States Court of Appeals
For the First Circuit

No. 88-1202

NEW ENGLAND ENERGY INC., ET AL.,

PLAINTIFFS, APPELLANTS,

v.

KEYSTONE SHIPPING COMPANY,

DEFENDANT, APPELLEE.

No. 88-1203

KEYSTONE SHIPPING COMPANY,

PLAINTIFF, APPELLEE,

v.

NEW ENGLAND ENERGY INC.,

DEFENDANT, APPELLANT.

JUDGMENT

Entered: AUGUST 24, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is reversed and this cause is remanded to the district court for further proceedings consistent with the opinion filed this day.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[CC: MESSRS. STEVENS AND PIERCE]

United States Court of Appeals
For the First Circuit

No. 88-1202

NEW ENGLAND ENERGY INC., ET AL.,

PLAINTIFFS, APPELLANTS,

v.

KEYSTONE SHIPPING COMPANY,

DEFENDANT, APPELLEE.

No. 88-1203

KEYSTONE SHIPPING COMPANY,

PLAINTIFF, APPELLEE,

v.

NEW ENGLAND ENERGY INC.,

DEFENDANT, APPELLANT.

Before

CAMPBELL, *Chief Judge*

COFFIN, BOWNES, BREYER, TORRUELLA AND SELYA,

Circuit Judges

ORDER OF COURT

Entered: OCTOBER 11, 1988

The petition for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of same judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be hereby denied.

By the Court:

FRANCIS P. SCIGLIANO

Clerk.

[CC: MESSRS. HENN AND PIERCE]

United States Court of Appeals
For the First Circuit

No. 88-1202

NEW ENGLAND ENERGY INC., ET AL.,

PLAINTIFFS, APPELLANTS,

v.

KEYSTONE SHIPPING COMPANY,

DEFENDANT, APPELLEE.

No. 88-1203

KEYSTONE SHIPPING COMPANY,

PLAINTIFF, APPELLEE,

v.

NEW ENGLAND ENERGY INC.,

DEFENDANT, APPELLANT.

ORDER OF COURT

Entered: NOVEMBER 4, 1988

Upon consideration of appellee's motion to recall mandate and stay its reissuance pending petition for writ of certiorari and opposition thereto,

It is ordered that mandate be constructively recalled and its reissuance stayed until December 2, 1988.

By the Court:

FRANCIS P. SCIGLIANO, *Clerk*

BY (s) DANIEL LOUGHRY

Chief Deputy Clerk.

[CC: MESSRS. STEVENS AND PIERCE]

[CERT. CC. U.S.D.C. OF MA]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA88-0013-XX

KEYSTONE SHIPPING CO.

v.

NEW ENGLAND ENERGY INC.

CA88-0014-XX

NEW ENGLAND ENERGY INC., ET AL

v.

KEYSTONE SHIPPING COMPANY

Before: THE HON. D. J. [WILLIAM G.] YOUNG

Appearances:

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OPINION

February 29, 1988
Central Session
Federal Building
Worcester, MA

* * *

THE COURT: The motion to consolidate is denied on the following grounds: The Court persists, having reviewed the papers and listened to the argument of counsel, in its initial impression that both these arbitrations and both these cases are closely related as that term is used in the local rules of this Court for case filings.

Further, the Court determines, were it relevant here, that significant economics, the chance of avoidance of inconsistent results, the close relationship of the parties and the commonality of significant portions of the evidence would warrant consolidation, if the Court had the power to consolidate.

However, a review of the cases leads the Court to believe that it does not have the power to consolidate. I want it clear, if I could consolidate, I would, but I don't think I can. And I reach that conclusion from the general language of the Supreme Court cases which, with virtual uniformity, strongly favor arbitration as a method of dispute resolution but which confine the scope of the Court's involvement to simply interpreting what the parties had in mind when they included an arbitration agreement.

The Court is satisfied from the representations with respect to the *Weyerhaeuser* case that notwithstanding the existence of a state provision providing for consolidation of arbitrations, there is no such provision in the Federal Arbitration Act. There is here no express agreement that one arbitration may be consolidated with another arising under another contract, and therefore, in the absence of any such express agreement and believing that the parties should be left to the agreements that are set out in their contracts, it is the judgment of this Court that these two arbitrations will not be consolidated.

There will be accordingly no stay in the appointment of an arbitrator. There is one other loose end, and it is the issue that in the first arbitration to be commenced, the third arbitrator has not yet been chosen. Both parties agree that the failure to choose the third arbitrator arises because of the litigation in court concerning possible consolidation, and, therefore, this Court does not exercise its authority to appoint a third arbitrator today and leaves to the parties 20 days to appoint a third arbitrator.

However, in light of the express request that the court appoint a third arbitrator, the Court will retain jurisdiction if the arbitrators presently appointed have not appointed a third arbitrator 20 days from today's date. Then the following procedure will be followed — because I don't want to impose upon the parties an individual not skilled in this particular situation, this particular maritime type.

The parties shall have ten more days to submit simultaneously on noon of the 10th day following, a list of five arbitrators acceptable to them, and on the 11th day the parties will rank one being the most desirable and fifth being the least desirable, and from that result the Court will pick an arbitrator, but as I say, I expect the parties to choose the arbitrator as the contract provides.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CENTRAL SECTION

CASE NUMBER: 88-0014-XX

NEW ENGLAND ENERGY INC., ET AL

v.

KEYSTONE SHIPPING COMPANY

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's Application for Consolidation of Two Arbitrations is DENIED.

FEB 29 1988
DATE

GEORGE F. MCGRATH, *Clerk*

BY (s) JEANNE TRAVERS
Deputy Clerk

DOCKETED

AMENDED AND RESTATED JOINT VENTURE AGREEMENT, MADE AS OF JULY 20, 1983, BETWEEN KEYSTONE SHIPPING CO. AND NEW ENGLAND ENERGY INC.

ARTICLE 22: DISPUTES

Any and all differences and disputes of whatsoever nature arising out of this Agreement shall be presented to a meeting of the Presidents of the respective parties for resolution. If any difference or dispute remains unresolved after such a meeting, they shall be referred to arbitration in the City of Boston pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by NEEI, one by Keystone, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the disputes or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with precisely the same force and effect as if said second arbitrator had been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a judge of any court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such judge on such application shall have precisely the same force and effect as if such

arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings, either party shall have the right, by written notice served on the arbitrators and on an officer of the other party, to specify further disputes or differences under this Agreement for hearing and determination. Awards made in pursuance of this section may include costs, including a reasonable allowance for attorneys' fees. Judgment may be entered upon any award made hereunder in any court having jurisdiction in the premises.

TIME CHARTER PARTY MADE AS OF OCTOBER 29, 1980, BETWEEN NEW ENGLAND COLLIER COMPANY AND NEW ENGLAND POWER COMPANY

ARTICLE 39: ARBITRATION

Any and all differences and disputes of whatsoever nature arising out of this Charter which cannot be resolved by the parties shall be put to arbitration in the City of Boston pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by Owner, one by Charterer and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the disputes or differences specified then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with precisely the same force and effect

as if said second arbitrator had been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a judge of any court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings, either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance of this clause may include costs, including a reasonable allowance for attorney's fees. Judgment may be entered upon any award made hereunder in any court having jurisdiction in the premises.

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-927

In the Supreme Court of the United States

OCTOBER TERM, 1988

KEYSTONE SHIPPING CO.,
PETITIONER,

v.

NEW ENGLAND ENERGY INC. AND
NEW ENGLAND POWER COMPANY,
RESPONDENTS.

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Does the Federal Arbitration Act preempt state arbitration procedures that are consistent with its policies and provisions?

2. Can federal courts, pursuant to the Federal Arbitration Act and a complementary state arbitration statute, order consolidation of two arbitrations where the arbitration agreements are silent on the issue of consolidation?

PARTIES INVOLVED AND RULE 28.1 LIST

The caption of the case in this Court contains the names of all parties.

Respondents, New England Energy Incorporated ("NEEI") and New England Power Company ("NEP"), are subsidiaries of New England Electric System, a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§79 to 79z-6 (1981). Respondents are affiliates of Granite State Electric Company, Massachusetts Electric Company, The Narragansett Electric Company, Narragansett Energy Resources Company, NEES Energy, Inc., New England Electric Transmission Corporation, New England Hydro-Transmission Corporation, New England Hydro-Transmission Electric Company, Inc., New England Power Service Company, New England Collier Company (a joint venture of NEEI and Keystone Shipping Co.), Ocean State Power (a general partnership whose partners are Narragansett Energy Resources Company and subsidiaries of Eastern Utilities Associates, TransCanada PipeLines Limited, Newport Electric Company, and J. Makowski Associates, Inc.), and Samedan-NEEI Exploration Company (a partnership of NEEI and Samedan Oil Corporation, a subsidiary of Noble Affiliates). Respondent NEP is a parent of Connecticut Yankee Atomic Power Company, Maine Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation, and Yankee Atomic Electric Company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Involved and Rule 28.1 List	ii
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	5
I. The Court of Appeals' Decision Is Consistent With the Federal Arbitration Act as Construed by This Court	5
A. In Its Recent Decisions Construing the Federal Arbitration Act, This Court Has Held That the Federal Act Creates a Federal Law of "Arbitrability," Not a Federal Law of Arbitration Procedures	6
B. This Court Has Never Held That the Federal Act "Occupies the Field," Thereby Preempting All State Arbitration Statutes	7
C. This Court's Prior Decisions Mandate the Conclusion That the Massachusetts Statute Is Not Preempted by the Federal Act	9
II. The Court of Appeals' Decision Creates No Significant Conflict Among the Circuits Requiring Resolution by This Court	12
Conclusion	16

Table of Authorities

Cases: Page

Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985) 3, 9, 12

Del E. Webb Construction v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987) 5, 12, 13, 14

Huber, Hunt & Nichols, Inc. v. *Architectural Stone Co.*, 625 F.2d 22 (5th Cir. 1980) 12, 13

Hyde Park Partners, L.P. v. *Connolly*, 839 F.2d 837 (1st Cir. 1988) 3

Keystone Shipping Co. v. *New England Energy Inc.*, 855 F.2d 1 (1st Cir. 1988) ..... *passim*

Louisiana Public Service Comm'n v. *F.C.C.*, 476 U.S. 355 (1986) 3, 8, 9, 10

Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 13

Mitsubishi Motors, Inc. v. *Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) 3

Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1 (1983) 3, 6

Perry v. *Thomas*, 107 S.Ct. 2520 (1987) 3, 5, 6, 7, 9

Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) 11

Quirk v. *Data Terminal Systems, Inc.*, 379 Mass. 762 (1980) 3, 11

Red Cross Line v. *Atlantic Fruit Co.*, 264 U.S. 109 (1924) 12

Shearson/American Express v. *McMahon*, 107 S.Ct. 2332 (1987) 3, 5

Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 3, 5, 6, 9

Stewart Organization, Inc. v. *Ricoh Corp.*, 108 S.Ct. 2239 (1988) 7

Weyerhauser Co. v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984) 2, 5, 12, 13, 14

Statutes: Page

9 U.S.C. §1. *et seq.* (1982) 3
§4 (1982) 5

MASS. GEN. LAWS ch. 251, §1, *et seq.* (1960) 11
§2 (1960) 11
§2A (1986) 3, 11
§7 (1978) 11
§11 (1960) 11
§12 (1972) 11
§13 (1972) 11
§14 (1960) 11

Legislative Materials:

H.R. Rep. No. 96, 68th Cong., 1st Session (1924) 8

Rules:

Rule 42(a), Federal Rules of Civil Procedure 13

In the
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-927

KEYSTONE SHIPPING CO.,
PETITIONER,

v.

NEW ENGLAND ENERGY INC. AND
NEW ENGLAND POWER COMPANY,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The respondents New England Energy Incorporated and New England Power Company (collectively, "NEEI/NEP") respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit reported at 855 F.2d 1 (1st Cir. 1988).

Statement of the Case

On January 15, 1988, NEEI/NEP commenced an action in state court seeking consolidation of the following two arbitrations:

(a) "Arbitration #1": an arbitration between petitioner Keystone Shipping Co. ("Keystone") and respondent New England Energy Incorporated ("NEEI") arising out of the operation of the coal carrying ship *Energy Independence*, and

(b) "Arbitration #2": an arbitration between New England Collier Company (the joint venture of Keystone and NEEI) ("NECCO") and respondent New England Power Company ("NEP") arising out of the operation of the *Energy Independence*.[1]

Each arbitration involves a common—indeed, central—question of law and fact: the proper rate to be paid by NEP to NECCO for the charter hire of the *Energy Independence* (App. at A-11 to A-13). Both arbitrations are required by contract to be held "in the City of Boston [Massachusetts] pursuant to the laws relating to arbitration there in force..." (App. at A-25 and A-26).

Based on diversity jurisdiction, Keystone removed the action to federal court. Relying on "the general language of the Supreme Court cases" and its understanding of *Weyerhauser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), the district court held that it could not order consolidation in the absence of an express agreement to consolidate. The district court also found, however, that "significant economies, the chance of avoidance of inconsistent results, the close relationship of the parties and the commonality of significant portions of the evidence would warrant consolidation.... I want it clear, if I could consolidate, I would, but I don't think I can." (App. at A-22).

---

[1] Both respondents are subsidiaries of New England Electric System, an electric utility holding company. Additional facts concerning the parties' contractual relationships, the *Energy Independence*, and the events giving rise to these arbitrations are set forth in the court of appeals' decision at App. A-2 through A-3 and A-11 through A-13.

In reversing the decision of the district court, the court of appeals considered two lines of cases: recent Supreme Court cases construing the Federal Arbitration Act,[2] 9 U.S.C. § 1 *et seq.* (the "Federal Act"), and federal precedent delineating federal preemption doctrine.[3] The court concluded that

> the Federal Arbitration Act has never been construed to preempt all state law on arbitration. We do not read the recent series of Supreme Court arbitration cases to establish such a proposition by implication. Those cases concerned only laws that would override the parties' choice to arbitrate rather than litigate in court, in direct conflict with the [Federal] Act's primary purpose of ensuring the enforcement of privately negotiated arbitration agreements. (App. at A-5).

The court of appeals then held that the Massachusetts arbitration consolidation provision, Mass. G.L. c. 251, § 2A, as applied in this case,[4] did not conflict with the Federal Act,

---

[2] The court considered *Perry* v. *Thomas*, 107 S. Ct. 2520 (1987); *Shearson/American Express* v. *McMahon*, 107 S. Ct. 2332 (1987); *Mitsubishi Motors, Inc.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983) (App. at A-3 to A-4).

[3] The court of appeals considered the "variants" of the preemption doctrine as set forth in *Louisiana Public Service Comm'n* v. *F.C.C.*, 476 U.S. 355, 368-69 (1986) and quoted in *Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 848-49 (1st Cir. 1988) (App. at A-5). *See* note 7 *infra*.

[4] The court noted that the last sentence of the Massachusetts statute, Mass. G.L. c. 251, § 2A, which states that "[n]o provision in any arbitration agreement shall bar or prevent action by the court under this section," is not at issue because the arbitration agreements in question are silent with respect to consolidation (App. at A-6 n.3). If this last sentence were construed to empower judges to consolidate arbitrations despite contractual language to the contrary, it would be in conflict with section 4 of the Federal Act. No such conflict is before the Court in this case. Moreover, it seems probable that the Massachusetts Supreme Judicial Court, if confronted with the issue, would hold that the terms of an arbitration agreement governed by the Federal Act would override the statutory language in question. *Cf. Quirk* v. *Data Terminal Systems, Inc.*, 379 Mass. 762, 767 n.2 (1980) ("We reiterate that the parties are, of course, free to limit the arbitration provision as they see fit by the terms of their contract.")

which says nothing about consolidation. The court "disagree[d] that ordering consolidation pursuant to a state statute when the contract is silent on the subject improperly modifies the agreement struck by the parties in violation of section four [of the Federal Act]."[5] (App. at A-6). According to the court:

> [N]othing in the recent series of Supreme Court decisions indicates that a state law whose purpose is to promote the expeditious resolution of cases *by means of the arbitral process* is at odds with the policy behind the Federal Arbitration Act. In each of the cases emphasized by [Keystone], the justices were faced with competing laws that would have placed claims in the courts instead of in arbitration. . . .
>
> The Massachusetts arbitration consolidation provision, as [NEEI/NEP] seek to enforce it, does not in any way limit "the broad principle of enforceability" of private agreements to arbitrate. There is no attempt here to divert a case from arbitration to court. Massachusetts seeks only to make more efficient the process of arbitrating. Although the Supreme Court has held that agreements to arbitrate must be enforced "even if the result is 'piecemeal' litigation," *Dean Witter Reynolds*, 470 U.S. at 221, the Court also has recognized the [Federal] Act's endorsement of "speedy and efficient decisionmaking," *id.* at 219. We fail to see why a state should be prevented from enhancing the efficiency of the arbitral process, so long as the state procedure does not directly conflict with a contractual provision. (App. at A-9 to A-10. Emphasis in original.)

---

[5] The court of appeals did not, as Keystone claims, hold that "the language of Section 4 was irrelevant." (Petition at 4.) To the contrary, the court of appeals, after reasoned analysis, found that an order consolidating the arbitrations was " 'in accordance with [the] terms' " of the arbitration agreements. (App. at A-6 to A-7, quoting Section 4).

In reaching this result, the court described the decisions in *Weyerhauser*, *supra*, and *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987), as reflecting "a 'hands off' approach to arbitrable claims," and concluded "that neither the [Federal] Act nor Supreme Court precedent mandates such a narrowly circumscribed role for the courts." (App. at A-8).

Judge Selya dissented, stating that if an arbitration agreement "omits reference to consolidation, the parties have made a choice [to refuse to allow consolidation]." (App. at A-16). Based on that unwarranted assumption, the dissent argued that the Massachusetts statute conflicts with section four of the Federal Act, requiring courts to enforce arbitration agreements "in accordance with the terms thereof." 9 U.S.C. § 4. The dissent also apparently construed this Court's recent arbitration decisions as holding that the Congress had occupied the field such that state law was preempted without regard to whether it conflicted with or complemented the Federal Act (App. at A-16 to A-17).

Reasons for Denying the Writ

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE FEDERAL ARBITRATION ACT AS CONSTRUED BY THIS COURT.

The court of appeals' decision is in full accord with this Court's decisions construing the Federal Act. As the court of appeals recognized, the Federal Act requires that courts " 'rigorously enforce agreements to arbitrate,' " *Shearson/American Express* v. *McMahon*, 107 S. Ct. at 2337 (quoting *Dean Witter Reynolds*, 470 U.S. at 221). Thus, in two recent decisions (*Southland* and *Perry*, note 1 *supra*, discussed further *infra*, section IA), this Court has held that state laws which *interfere with* the submission of disputes to the arbitral process as agreed to by the parties are preempted by the Federal Act. This Court has never held that state procedures which operate within the arbitral process are preempted. Where, as here, the state procedure does not conflict with the agreement of the parties, this Court's prior decisions indicate that the procedure is not preempted.

A. *In Its Recent Decisions Construing the Federal Arbitration Act, This Court Has Held That the Federal Act Creates a Federal Law of "Arbitrability," Not a Federal Law of Arbitration Procedures.*

In an effort to establish a conflict between the decisions of this Court and the court of appeals' decision, Keystone erroneously attempts to convert the Federal Act's creation of a "federal substantive law of arbitrability," *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. at 24, into "a uniform body of federal arbitration law superseding the policy concerns of the individual states." (Petition at 13, argument heading II). The Court has never held that the Federal Act creates "a uniform body of federal arbitration law." Rather, the Court's six recent decisions, *see* note 2, *supra*, all concern "arbitrability" or the "enforceability" of arbitration agreements in the face of other federal and state law that would divert resolution of an arbitration to a judicial forum. Of these six cases, only two concern preemption of state statutes—*Southland Corp.* v. *Keating*, *supra*, and *Perry* v. *Thomas*, *supra*. Each of those cases, unlike this case, concerned a state law that would have diverted a dispute from arbitration to the judicial process.

Indeed, both *Southland* and *Perry* make clear that the preemptive scope of the Federal Act is that of actual conflict. *Southland* involved a state franchise investment statute that would have caused an arbitration clause to be declared void and unenforceable; this statute was held to be in direct conflict with the Federal Act. *Id.*, 465 U.S. at 10-11. "We see nothing in the [Federal] Act indicating that the broad principle of enforceability is subject to any additional limitations under state law," the Court observed, *id.* at 11; "[C]ongress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. *Perry* involved a state "wage collection" statute authorizing suit in

court without regard to any private agreement to arbitrate, which was "in unmistakable conflict" with Section 2 of the Federal Act. 107 S. Ct. at 2526.

The court of appeals' decision in this case fully recognized and implemented the Federal Act's policy of arbitrability. That decision is, therefore, consistent with this Court's prior rulings.

B. *This Court Has Never Held That the Federal Act "Occupies the Field," Thereby Preempting All State Arbitration Statutes.*

Keystone's claim that the court of appeals' decision conflicts with the Federal Act depends in the first instance on the erroneous notion that all state legislation has been preempted because Congress has mandated a "uniform body of federal arbitration law." (Petition at 13, argument heading II). According to Keystone, "[t]his Court has repeatedly stressed that the Federal Act...preempts the application of state arbitration laws to arbitration agreements falling within its ambit." (Petition at 7)[6] This Court has never so held.

The broad preemption for which Keystone argues takes place only where "Congress has legislated comprehensively,

[6] Keystone erroneously claims that recent Supreme Court cases support this proposition. (Petition at 7 and n.4.) In fact, those cases simply held that the Act mandates enforcement of arbitration agreements "notwithstanding any state substantive or procedural policies *to the contrary.*" *Moses H. Cone Hosp., supra*, 460 U.S. at 24 (emphasis supplied). In that regard, Keystone's citation (Petition at 10) of *Stewart Organization, Inc.* v. *Ricoh Corp.*, 108 S. Ct. 2239, 2242 and n.4 (1988), is misplaced. *Stewart* dealt with whether federal or state venue law should be applied in a diversity action. In this case, all parties and the court of appeals agree that the Federal Act applies. (App. at A-5 n.2). In *Stewart*, there was a clear conflict between state and federal law. *Id.* at 2241. In this case, the court of appeals held that the Massachusetts statute was consistent with the Federal Act and that a consistent state statute could supplement the Federal Act. To create a conflict between this Court's decisions and the holding of the court of appeals, Keystone has obscured a central element of the court of appeals' holding—that the Massachusetts statute is consistent with the Federal Act.

thus occupying an entire field of regulation and leaving no room for the States to supplement federal law." *Louisiana Public Service Commission* v. *F.C.C.*, 476 U.S. at 368.[7] Neither the terms of the Federal Act, its legislative history, nor the decisions of this Court support the position that Congress has preempted all state legislation. "None of the various preemption standards suggests that Congress intended the Federal Act to supersede all state arbitration law, and... Keystone does not argue to the contrary." (App. at A-5). Keystone should not be heard to change its position before this Court. In any event, its new position is incorrect.

Far from being comprehensive, the provisions of the Federal Act simply create a general requirement that courts—state and federal—enforce arbitration agreements that involve interstate commerce. Congress evidently intended to override the common law "anachronism" whereby some courts "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction.... This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." H.R. Rep. No. 96, 68th

[7] *Louisiana Public Service Comm'n* sets out six situations when preemption occurs: (1) "when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law"; (2) "when there is outright or actual conflict between the federal and state law"; (3) "where compliance with both federal and state law is in effect physically impossible"; (4) "where there is implicit in federal law a barrier to state regulation"; (5) "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law"; and (6) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." 476 U.S. at 368-69. In evaluating whether state laws are preempted by the Federal Act, the Court has uniformly applied situation (2) ("outright or actual conflict"). It seems clear that situations (1), (3), and (4) have no relevance to this case. Keystone argues erroneously that situation (5) ("occupying the field") applies to the Federal Act (Petition at 8) and, without articulating this formulation, also seems to suggest that situation (6) (state law as an "obstacle" to accomplishment of Congress' objectives) mandates preemption of the Massachusetts statute (Petition at 13-16). NEEI/NEP deal with situation (5) ("occupying the field") in this section (I B) and with situations (2) ("outright or actual conflict") and (6) ("obstacle to Congress' objectives") in the next section (I C).

Cong., 1st Sess. 1-2 (1924), *quoted in Dean Witter Reynolds, supra*, 470 U.S. at 220 n.6. There is no indication that Congress sought to preempt all state legislation. Indeed, Congress did not even create independent federal question jurisdiction for suits brought pursuant to the Federal Act.

C. *This Court's Prior Decisions Mandate the Conclusion That the Massachusetts Statute Is Not Preempted by the Federal Act.*

Consistent with Congress' decision not to occupy the entire field of arbitration, when the Court has subjected state laws to preemption analysis in light of the Federal Act, it has required an outright or actual conflict between state and federal law. *See Perry* v. *Thomas, supra,* and *Southland Corp.* v. *Keating, supra.* In considering whether a state law conflicts with a federal statute, the Court is "guided by the familiar rule of construction that, where possible, provisions of a [state] statute should be read so as not to create a conflict." *Louisiana Public Service Comm'n, supra* at 370.

The state statute involved in this case in no way conflicts with the Federal Act. As the court of appeals correctly understood (App. at A-9), the Massachusetts arbitration provision as applied in this case has no impact on the primary policy underlying the Federal Act—enforcement of private arbitration agreements (*see Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. at 221). Moreover, it furthers the secondary policy of the Federal Act—encouragement of efficient and speedy dispute resolution (*id.* at 219).[8]

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[8] Keystone at one point seems to agree that consolidation may be more efficient, but suggests that after *Dean Witter*, efficiency is no longer an appropriate goal of the Federal Act (Petition at 9). However, this Court has never rejected efficiency as an objective of the Federal Act, but has merely held that efficiency could not override the Federal Act's principal goal—making sure that arbitration agreements are enforced. *See Dean Witter*, 470 U.S. at 221. After having read efficiency out of the Act, Keystone does an about-face and argues incorrectly that the Court should create uniform arbitration procedures because any variations from state to state would impair efficient resolution of disputes. (Petition at 16 and n.16). Keystone cannot have it both ways.

Unable to point to an actual conflict between the Federal Act and the Massachusetts statute, Keystone alleges that the court of appeals' decision "undermines the congressional policy to encourage arbitration of disputes and the congressional intent to create a uniform body of federal arbitration law superseding the policy concerns of the individual states" (Petition at 13, argument heading II).[9] As discussed *supra*, the Federal Act, as construed by this Court, rather than creating a uniform body of arbitration law, creates a uniform policy of "arbitrability." The Massachusetts statute neither conflicts with nor in any way stands as an obstacle to the accomplishment of that policy.

Apparently recognizing that the court of appeals' decision does not contravene the Federal Act's policies, Keystone asks this Court to depart from its prior decisions and preempt all state procedures, even those that do not conflict with the terms of an arbitration clause, as being an obstacle to achievement of the purposes of the Federal Act. It would have the Court believe that the court of appeals' decision would permit federal courts to intervene without limitation "to 'supplement' the terms of private arbitration agreements."[10] (See Petition at 14-15.) This

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[9] In so arguing, Keystone apparently contends that the Massachusetts statute is preempted because "state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Public Service Commission* v. *F.C.C.*, 476 U.S. at 368-69. *See* discussion at note 7, *supra*, of preemption situation (6).

[10] It is far from clear whether state procedures that supplement agreements would tend to discourage or encourage agreements to arbitrate. Parties to an arbitration agreement that includes a general arbitration clause must believe that they will be bound by procedures not specifically described in their agreement. While some parties specify the source of the procedures, *e.g.*, the Rules of the American Arbitration Association ("AAA"), others presumably rely on the existence of procedures that are set by local or state law and would be reluctant to agree to arbitration if they thought that no such procedures existed. Here, the parties *in their arbitration clauses* (not in a general choice of law provision) chose "arbitration in the City of Boston pursuant to the laws relating to arbitration there in force." (App. at A-25 and A-26). By choosing the laws "relating to arbitration" in force in the City of Boston, the parties chose a set of arbitration procedures that include consolidation. The absence of a specific reference to consolidation in the

contention rests on the unsupported assertion that the hypothetical possibility of such state-mandated procedures—of which Keystone supplies no actual examples —will "prompt parties to resort to federal court before proceeding to arbitration." (Petition at 16). In short, the Court is asked to preempt *all* state legislation concerning arbitration to avoid the possibility that some states may at some future date pass some law that might interfere with the policies of the Federal Act.

In sharp contrast with Keystone's hypothetical scenario, the Massachusetts Arbitration Act, Mass. G.L. c. 251, § 1 *et seq.*, which is an enactment of the Uniform Arbitration Act, provides: that arbitration agrements are "valid, enforceable and irrevocable" (§ 1); for *summary* determination of suits involving "failure or refusal of a party to proceed to arbitration" (§ 2(a)); for stays of judicial proceedings involving issues subject to arbitration (§ 2(d)); and for broad enforcement of arbitral decisions (§§ 11-14). The "consolidation or severance" provision challenged by Keystone mandates that "[t]he court shall proceed summarily to the determination of the issue so raised." *Id.* at § 2A. The Massachusetts statute, on its face and as construed by the courts,[11] shares the identical objectives of

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agreements should be treated no differently than the absence of a listing of specific AAA rules when those rules have been adopted by reference.

Keystone's own conduct belies its argument that the court of appeals' decision imposes on parties the burden of "rul[ing] out consolidation" in their agreements (Petition at 13). It is Keystone that would use the federal courts to deprive parties in Massachusetts of the opportunity to incorporate by reference the state arbitration consolidation procedure. Keystone apparently believes that arbitration will be more attractive if parties must choose between listing specific procedures that will control the arbitration or arbitrating in a procedural vacuum. The belief is unsupported and counter-intuitive.

[11] *See, e.g., Quirk* v. *Data Terminal Systems, Inc.*, 379 Mass. 762, 766-67 (1980) (discussing the broad enforceability of arbitration agreements, and following the reasoning in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967) that "the arbitration procedure, when selected by the parties to a contract, [should] be speedy and not subject to delay and obstruction in the courts.")

the Federal Act—enforcement of arbitration agreements and speedy and efficient resolution of disputes. *Dean Witter Reynolds, supra*, 219, 221. Contrary to the dissent (App. at A-16), Massachusetts does not have a "pro-consolidation policy." Section 2A of the Massachusetts statute provides for "consolidation *or severance*" of arbitration proceedings (emphasis added). Massachusetts' policy is more accurately described as pro-fairness, pro-efficiency, and strongly pro-arbitration.

NEEI/NEP do not deny that state legislatures might enact procedures that conflict with the Federal Act. However, the possibility of such enactments does not justify preemption of all state legislation, including legislation that is consistent with the terms of the Federal Act and furthers its purposes.[12]

II. The Court of Appeals' Decision Creates No Significant Conflict Among the Circuits Requiring Resolution by This Court.

Keystone inaccurately contends that the court of appeals' decision significantly conflicts with the Ninth Circuit's decision in *Weyerhauser* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), and the Fifth Circuit's decisions in *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987) and *Huber, Hunt & Nichols, Inc.* v. *Architectural Stone Co.*, 625 F.2d 22 (5th Cir. 1980). Those cases contain dicta which suggest that, if presented with the issue, the courts in question

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[12] Keystone cites (Petition at 11) Justice McReynold's dissenting opinion in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 131 (1924), which argued against allowing state-created variations in arbitration methods for maritime cases. But Justice Brandeis for the Court upheld a particular state-created method of arbitration for a maritime case because it dealt "merely with the [procedural] remedy", *id.* at 124, and thus "supplemented the substantive maritime law, and did not conflict with any essential feature of it." *Id.* at 124-125.

might well hold that the Federal Arbitration Act preempts a state consolidation procedure. However, those courts were not confronted with that issue. The "conflict" which Keystone claims is in fact no more than the potential for future conflict in cases which have not yet arisen.

The issue raised in the court of appeals' decision in this case has not been clearly presented to other courts of appeals. Neither *Weyerhauser* nor *Del E. Webb* addressed the validity of a state statute authorizing consolidation; both cases dealt with the court's inherent power under the Federal Act and Fed. R. Civ. P. 42(a) to consolidate and concluded that, absent express language in an arbitration agreement permitting consolidation, such power did not exist. *See Weyerhauser, supra* at 637; *Del E. Webb, supra* at 149-50.[13] The First Circuit "[did] not decide whether a federal court also has the power, under Fed. R. Civ. P. 42(a), to order consolidation in the absence of a state law providing for it." (App. at A-3). Assuming *arguendo* that consolidation on the basis of Rule 42(a) or the federal court's inherent power might be inconsistent with the Federal Act, it does not follow that state consolidation statutes should be preempted. Judicially created federal law favoring consolidation would be more easily preempted than state law because principles of federalism requiring deference to state law would be inapplicable. *See Milwaukee* v. *Illinois*, 451 U.S. 304, 316-17 (1981).

Any difference in approach that may exist, therefore, is at a relatively undeveloped stage. Only the Court of Appeals for the First Circuit has squarely addressed the question whether the Federal Act preempts even complementary state statutes. If the Court addresses the issue at this time, it will not have the benefit of full consideration by a number of courts of appeals.

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[13] Although *Huber, Hunt & Nichols, supra*, held that federal law and not Louisiana law governs consolidation of arbitrations, the court was not confronted with a state statute authorizing consolidation and apparently did not undertake preemption analysis.

To the extent the circuits diverge, the divergence here is not of great moment. Each of the First, Fifth, and Ninth Judicial Circuits fully implements the primary policy of the Federal Act—the enforceability of arbitration contracts. The different outcomes among the circuits as to whether the arbitrations could be consolidated resulted largely from differences in contract interpretation and not from conflicting views of the Federal Act.[14] The *Weyerhauser* court assumed that where an arbitration agreement is silent with respect to consolidation, ordering consolidation would be *contrary* to Section 4 of the Federal Act, which requires courts to direct the parties "to proceed to arbitration in accordance with the terms of the arbitration agreement." 743 F.2d at 637; *accord Del E. Webb*, *supra* at 150. The Court of Appeals for the First Circuit

> disagree[d] that ordering consolidation pursuant to a state statute when the contract is silent on the subject improperly modifies the agreement struck by the parties in violation of section four. We believe. . . that an order not contradicting the contractual terms regarding arbitration is "in accordance with [those] terms." This is certainly true when the language of the arbitration clause is broad and in no way suggests limits on the subjects or

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[14] The courts of appeals are in agreement that the determination of whether two arbitrations can be consolidated is essentially a matter of contract interpretation. The court in *Del E. Webb*, *supra* at 150, found that "Paragraph 7.9.1 [of the arbitration agreement] explicitly excludes the architect from consolidated arbitration." The *Weyerhauser* court, *supra* at 637, found that "each [arbitration] clause requires only arbitration between the parties to the agreement. In fact, Trans-Pacific specifically secured an addendum to its agreement with Weyerhauser insulating Trans-Pacific from any increase in its obligations by reason of any subcharter Weyerhauser might execute." In this case, the First Circuit applied principles of contract interpretation to determine that ordering consolidation pursuant to the Massachusetts statute accorded with the terms of the arbitration agreements (App. at A-6 through A-7).

> parties to the agreed-upon arbitration.... [A] person directed to take an early plane to New York would be acting "in accordance with" her instructions whether she flew coach or first class, notwithstanding the instructions' silence on the type of seat to purchase. Our traveller also would not violate her instructions, which were silent on how she was to get to the airport, if she were to take a taxicab. Simply put, arbitration is still arbitration even if it is consolidated arbitration. (App. at A-6 through A-7.)

Presumably there are a multitude of arbitration contract clauses whose "terms" require interpretation each year. A difference among the circuits as to meaning of the "terms" of a given clause and as to the parties' intentions concerning a subject upon which the agreement is silent does not present an issue of sufficient significance to merit granting the writ.

Moreover, variations from court to court and circuit to circuit with respect to the specific procedures for carrying out the Federal Act are inevitable. Even in the Ninth Circuit, which disfavors consolidation except where specifically required by contract, district courts will necessarily make decisions comparable to those relating to consolidation in determining whether to order a dispute to arbitration. For example, if an arbitration is already in progress and one of the parties initiates a new arbitration on an overlapping or identical issue, a court would likely treat the new arbitration as included in the prior arbitration. Where such "inclusion" leaves off and consolidation begins is a question of line drawing. How various courts draw such lines has no impact on the policy of arbitrability, is inevitable in a system that seeks to decide individual cases fairly and expeditiously, and therefore does not present an issue that needs to be resolved by the Court.

Conclusion

For the foregoing reasons, the petition for writ of certiorari does not present any question warranting the Court's review, and the Court should deny the petition.

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No. 88-927

In the Supreme Court of the United States

OCTOBER TERM, 1988

KEYSTONE SHIPPING CO.,
PETITIONER,

v.

NEW ENGLAND ENERGY INC., AND
NEW ENGLAND POWER COMPANY,
RESPONDENTS.

**On Writ of Certiorari to
The United States Court of Appeals
For the First Circuit**

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Argument 1

Conclusion 5

TABLE OF AUTHORITIES

Cases:

Boston and Maine Corp. v. *Chicago, Burlington and Quincy Railroad Co.*, 381 F.2d 365 (2d Cir. 1967), *cert. denied*, 390 U.S. 1027 (1968) 3

Budinich v. *Becton Dickinson and Co.*, 108 S.Ct. 1717 (1988) 3, 4

Collins Radio Co. v. *Ex-Cell-O Corp.*, 467 F.2d 995 (8th Cir. 1972) 3

Del E. Webb Construction v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987) 1, 2, 5

Huber, Hunt & Nichols, Inc. v. *Architectural Stone Co.*, 625 F.2d 22 (5th Cir. 1980) 3

Michele Amoruso e Figli v. *Fisheries Development Corp.*, 499 F. Supp. 1074 (S.D.N.Y. 1980) 3

New England Energy Inc. v. *Keystone Shipping Company*, 855 F.2d 1 (1st Cir. 1988) ..... *passim*

Ore & Chemical Corporation v. *Stinnes Interoil, Inc.*, 606 F. Supp. 1510 (S.D.N.Y. 1985) 3

Paul Allison, Inc. v. *Minikin Storage of Omaha, Inc.*, 486 F. Supp. 1 (D. Neb. 1979) 3

Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) 2

Stewart Organization, Inc. v. *Ricoh Corporation*, 108 S.Ct. 2239 (1988) 3

Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 4

Weyerhaeuser Co. v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984) 1, 2, 5

Statutes:

	Page
9 U.S.C. §4 (1982)	1, 2
Mass. Gen. Laws, ch. 251, §2A (1986)	4

Legislative Materials:

Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924)	4
H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924)	5

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For the First Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

An Intolerable Conflict Exists Among the Circuits Concerning the Proper Interpretation of Section 4 of the Federal Arbitration Act.

1. The presence of a state statute does not remove the conflict between the First Circuit's decision in this case and the Ninth Circuit's decision in *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), and the Fifth Circuit's decision in *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987) (Br. Opp. at 12-13). The conflict arises from the First Circuit's interpretation of the phrase in Section 4 of the Federal Arbitration Act ("Federal Act"), 9 U.S.C. §4 (1982), "in accordance with the terms of the agreement" to

mean not contradicted by the terms of the arbitration agreement.[1] Such an interpretation of Section 4 conflicts with the plain and ordinary meaning of the statutory language and the decisions of the Ninth Circuit in *Weyerhaeuser* and the Fifth Circuit in *Del E. Webb*. These decisions interpret the same language of Section 4 as requiring contractual consent to consolidated arbitration.

Contract Interpretation Is Not at Issue.

2. Respondents' suggestion that differences in contract interpretation account for the conflict between the circuits (Br. Opp. at 14, 15) is in error. The district court specifically found that the terms of the parties' arbitration agreements did not authorize consolidation (App. at A-22). The court of appeals made no contrary determination[2] and the district court's interpretation remains as the controlling interpretation of the parties' arbitration agreements in the record.

The Authority and Procedures of the Federal Courts Are Set by Congress and Not by the States, and Therefore a Traditional Preemption Analysis Is Inappropriate.

3. Respondent's preemption arguments are misdirected (Br. Opp. at 7-9). The issue is not whether all state arbitration law is broadly preempted, but what law is to be applied by the federal courts. In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967), this Court stated the applicable rule as follows: "Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power."

The court of appeals' decision to "supplement" the Federal Act with procedures taken from state arbitration law (App. at

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[1] The court of appeals held "that an order not contradicting the contractual terms regarding arbitration" is "in accordance with [those] terms" (App. at A-6).

[2] The court of appeals stated: "Our assumption in this case is that the parties' contracts are, in fact, silent on the issue of consolidation" (App. at A-10).

A-5 n.2) cannot be supported by traditional preemption analysis. Contrary to Respondents' position that a state procedural statute should be applied by the federal courts (Br. Opp. at 7 n.6), the Federal Act can comprehensively control the authority of the federal courts without regard to whether there is a direct conflict with state procedural law. *See Stewart Organization, Inc.* v. *Ricoh Corporation*, 108 S.Ct. 2239 (1988).

Despite the Federal Act's silence on numerous issues, federal courts have consistently rejected application of local state law to determine the substantive and procedural rules governing arbitration agreements within the ambit of the Federal Act. The courts have adopted this position without finding it necessary to apply a traditional preemption analysis. *See Huber, Hunt & Nichols, Inc.* v. *Architectural Stone Co.*, 625 F.2d 22, 25-26 (5th Cir. 1980) (consolidation); *Ore & Chemical Corporation* v. *Stinnes Interoil, Inc.*, 606 F. Supp. 1510, 1515 n.5 (S.D.N.Y. 1985) (consolidation). Even where state law does not differ from federal law developed under the Federal Act, federal law, and not state arbitration law, has been held to control. *See Boston and Maine Corp.* v. *Chicago, Burlington and Quincy Railroad Co.*, 381 F.2d 365, 366 (2d Cir. 1967), *cert. denied*, 390 U.S. 1027 (1968) ("We believe we are required to point out...that... we, unlike the district judge who ordered its enforcement according to the law of New York, would have ordered enforcement under the Federal Arbitration Act"). *See also Michele Amoruso e Figli* v. *Fisheries Development Corp.*, 499 F. Supp. 1074, 1080 n.9 (S.D.N.Y. 1980) (time limit in state arbitration act for contesting arbitrability not controlling); *Collins Radio Co.* v. *Ex-Cell-O Corp.*, 467 F.2d 995, 997 (8th Cir. 1972) (state requirement for attorney advice and consent not controlling); *Paul Allison, Inc.* v. *Minikin Storage of Omaha, Inc.*, 486 F. Supp. 1, 4 (D. Neb. 1979) (procedure under state arbitration act to validate an award not controlling).

As this Court indicated in interpreting a federal procedural statute (28 U.S.C. §1291) in *Budinich* v. *Becton Dickinson and Co.*, 108 S.Ct. 1717 (1988), the proper inquiry is whether, in using the phrase (in Section 4) "in accordance with the terms of the agreement" Congress meant to "borrow or incorporate state law." *Id.* at 1720. As in *Budinich*, the "context of its use makes such a reference [to state law] doubly implausible, since that provision applies to all federal litigation and not just diversity cases." *Id.* Moreover, the testimony in the congressional hearings specifically indicated that existing law provided that the "Federal court will not be bound by any State statute." *Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess., 16 (1924) (statement of Mr. Cohen, American Bar Association).

The Federal Act Provides for a Uniform Federal Law.

4. Respondents' refusal to acknowledge a comprehensive and uniform body of federal law under the Federal Act (Br. Opp. at 10) is misguided. As Justice O'Connor stated in *Southland Corp.* v. *Keating*, 465 U.S. 1, 34 (1984) (O'Connor, J., dissenting), "[t]he drafters' plan for maintaining reasonable harmony between state and federal practices was not to bludgeon States into compliance, but rather to adopt a uniform federal law. . . ."

Application of a Massachusetts Procedural Statute by a Federal Court Conflicts With Controlling Federal Law.

5. Respondents' assertion that the Federal Act is solely concerned with arbitrability (Br. Opp. at 6 and 10) ignores the comprehensive procedural nature of the Federal Act. *See Southland*, 465 U.S. at 23 (O'Connor, J., dissenting) ("Congress thought it was exercising its powers to dictate either procedure or 'general federal law' in federal courts").

The court intervention which results from application of the Massachusetts statutory provision for consolidation without contractual consent[3] is, at the very least, inconsistent with the congressional intent to minimize judicial "interference." H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924). As a result arbitration will become more like litigation and a party's desire to avoid the courts less likely to be realized.

The court of appeals itself recognized that there is a substantial conflict between its view of the role of the federal courts under the Federal Act and what it characterized as the "hands off" view expressed in the decisions of the Ninth and Fifth Circuits in *Weyerhaeuser* and *Del E. Webb* (App. at A-8).

Conclusion

For the reasons more fully set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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[3] The court of appeals held that "consent is not a prerequisite to application of the Massachusetts consolidation statute" (App. at A-11).